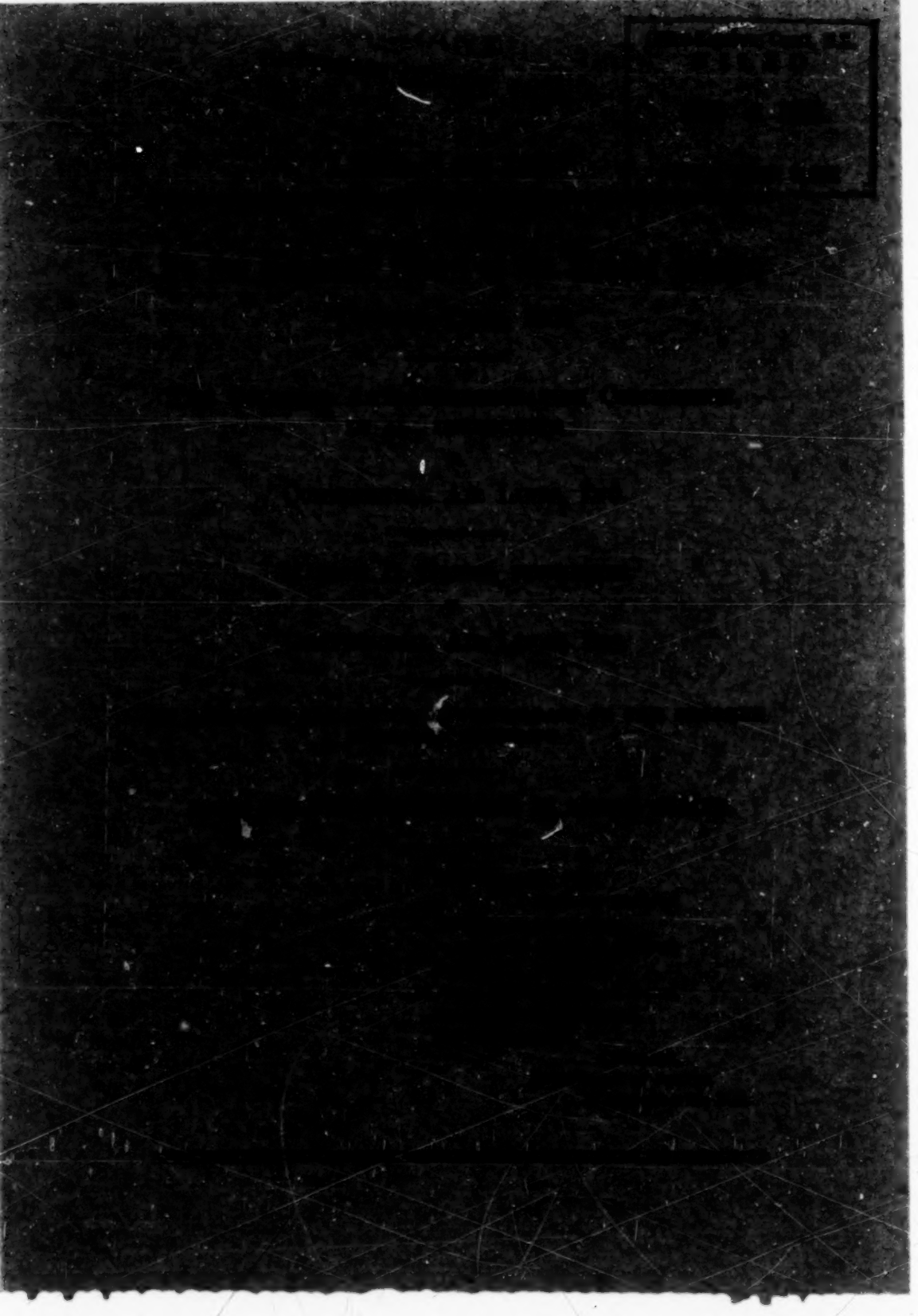

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION, ET AL., PETITIONERS

v.

CONTINENTAL AIR LINES, INC.

No. 492

MARLON D. GREEN, PETITIONER

v.

CONTINENTAL AIR LINES, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the District Court of the City and County of Denver (R. 257–286) is unreported. The opinion of the Supreme Court of Colorado (R. 288–309) is reported at 368 P. 2d 970.

JURISDICTION

The judgment of the Supreme Court of Colorado was entered on February 13, 1962 (R. 310). Petitions for rehearing, filed by both petitioners, were denied on March 5, 1962 (R. 314). Petitioners Green and the Colorado Anti-Discrimination Commission filed petitions for writs of certiorari on April 30, 1962, and May 26, 1962, respectively. On October 8, 1962, this Court granted both petitions (R. 314–315). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the Colorado Anti-Discrimination Act, which forbids racially discriminatory employment practices and establishes a commission with power to enforce the Act, may be applied, consistently with the commerce clause, to the hiring practices of an interstate air carrier, where the hiring in question is conducted solely within the State of Colorado.

2. Whether such application of the Colorado Act is preempted by federal legislation dealing with air commerce, the Railway Labor Act, or federal executive orders relating to discrimination by contractors who deal with the federal government.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant constitutional provisions, federal and Colorado statutes, and federal regulations are set forth in the Appendix, *infra*, pp. 58–62.

INTEREST OF THE UNITED STATES

The specific issue in this case is whether a State, through an anti-discrimination commission, has the power to prohibit discrimination by an air carrier between applicants for the position of pilot solely on the basis of race. Stated generally, this case involves the power of the States to prohibit racial discrimination in the hiring of persons to fill thousands of jobs on planes, railroad trains, trucks, buses, and ships which move in interstate commerce.

Discrimination against Negroes in employment is widespread, particularly when they seek skilled positions like that of a pilot. The result is not merely to deny countless Negro citizens equal opportunity to earn a livelihood. In addition, "The waste of human resources resulting from the lack of needed skills is a serious obstacle to full realization of the Nation's capabilities." 1961 United States Commission on Civil Rights Report, *Employment,* p. 2.

The national policy of the United States is strongly opposed to racial discrimination in employment. In Executive Order 10925, 26 Fed. Reg. 1977 (March 6, 1961), establishing the President's Committee on Equal Employment Opportunity, President Kennedy declared that it was "in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower." The national policy against employment discrimination would not be served by the significant reduction in the permissible scope of state anti-discrimination laws which would result if the judgment

below were sustained. The United States further wishes to express its views on the question whether, as the court below found, the channels of interstate commerce would be unreasonably burdened if the application of the state anti-discrimination statute to this case were upheld.

STATEMENT

Petitioner Marlon D. Green, a captain in the United States Air Force (R. 34) and a rated pilot since 1951 (R. 28, 223), decided to leave the Air Force in 1957 in order to seek employment as a commercial airline pilot (R. 34). Upon his discharge, Captain Green had logged 3,071 hours of flying time (R. 32, 224), many in difficult air-sea rescue service (R. 183). He traveled to California, Denver, Chicago, New York, and Washington, D.C., to obtain a pilot's position but was unsuccessful (R. 183).

In August 1957, Green filed a complaint with the Colorado Anti-Discrimination Commission (the other petitioner, hereinafter referred to as the "Commission") (R. 1). The complaint alleged that respondent Continental Air Lines, Inc., a commercial airline with headquarters in Denver, had violated the Colorado Anti-Discrimination Act of 1957 (1953 Colo. Rev. Stat. (Perm. Supp. 1960) §§ 80-24-1 to 80-24-8) (1) by refusing, on or about July 8, 1957, to employ Green as a commercial airline pilot because he is a Negro; (2) by failing to advise Green as to the action taken on his employment application within a specified period of time, as it had promised, and (3) by requiring, on its employment application form, desig-

nation of the applicant's race and attachment of a photograph (R. 1).

The "Coordinator" of the Commission (the Commission's investigating official) determined that probable cause existed for believing the allegations of the complaint, and, pursuant to the Commission's direction, attempted to dispose of the complaint by informal methods of conference, conciliation, and persuasion. Ultimately, however, he reported to the Commission that further effort would be futile. The Commission thereupon ordered a hearing and directed Continental to answer the charges of the complaint (R. 2–3).

Continental's answer admitted that it was a "commercial carrier by air and that it maintains an office at Stapleton Airfield, Denver, Colorado," but denied that it had violated the Act (R. 4). Continental further asserted, *inter alia,* that it was "engaged in the interstate transportation of passengers and freight by air by virtue of and subject to the laws, statutes and regulations of the United States applicable to interstate commercial carriers by air, including the Civil Aeronautics Act of 1938, as amended (49 U.S.C.A. §§ 401 *et seq.*) and the Railway Labor Act, as amended (45 U.S.C.A. §§ 151 *et seq.*)," and that "[b]y such laws, statutes and regulations the United States has pre-empted and reserved to its exclusive jurisdiction the regulation and control of interstate commercial carriers by air pursuant to the provisions of Article I, Section 8 of the Constitution of the United States" (R. 6). The answer requested the Commission to dismiss the complaint for lack of jurisdiction over the subject matter (R. 6).

At the hearing before the Commission, Continental's Vice President for Personnel (R. 96) testified that Continental operates in eight States, including Colorado (R. 109).[1] He testified further that Continental employs approximately 220 pilots, 90 to 95 of whom are "based in Denver"; that approximately 800 of its employees are stationed in Denver (R. 109); that Continental's "employment operation" was "conducted approximately three and a half miles away from the [Denver] airport" (R. 98); that an applicant for the position of pilot is interviewed and given "a link check[2] and a flight check" in Denver (R. 99); and that, in 1957, Continental selected approximately 35 pilots from approximately 178 brought to Denver to be interviewed (R. 102). The testimony also showed that Continental had asked Green to report to Denver for an employment interview (R. 38), and that Green had reported to Continental's office at the Denver Airport where he was given a link check and a flight check (R. 39, 44).

On December 19, 1958, after extensive hearings, the Commission entered "Findings Of Fact, Conclusions Of Law And Orders," signed by the Coordinator (R. 223). The Commission assumed the constitutionality of the Anti-Discrimination Act and determined that it had jurisdiction to hear the complaint. The Commission found that Continental was guilty of a discriminatory and unfair employ-

[1] Colorado, New Mexico, Texas, Oklahoma, Kansas, Missouri, Illinois, and California (R. 109).

[2] A "link check" is a test of an applicant's skill under simulated flight conditions (R. 39).

ment practice in requiring that the race of the applicant be shown on the application form and that a photograph be attached to the application (R. 224). It further found that Green "had more flying hours than any other applicant and was better qualified for the position of co-pilot than any applicant interviewed, but was not hired because of the discriminatory act of Respondent" (R. 225), and that "the only reason that * * * [Green] was not selected for the training school was because of his race" (R. 225). The Commission therefore ordered Continental to cease and desist from the discriminatory and unfair employment practice and to give Green the first opportunity to enroll in its next course in the training school. Green was given until January 10, 1959, to indicate his willingness to enter the next pilot training course (R. 226). On December 31, 1958, Green notified the Commission of his intention to enroll in the next course (R. 226), and on January 7, 1959, the Commission entered an order notifying Continental of Green's decision (R. 226).

On February 3, 1959, Continental filed a petition for review of the Commission's order in the District Court of the City and County of Denver (R. 227). Considerable litigation followed, including a remand for further findings which were supplied by a stipulation that (R. 256):

> Continental * * * was engaged in business as a commercial carrier by air of passengers, freight, and United States mail pursuant to a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board. Conti-

nental is qualified to do business in the state of Colorado where its principal offices are located.

(b) Continental conducted its business in and between the states of Colorado, New Mexico, Texas, Oklahoma, Kansas, Missouri, Illinois and California. By reason thereof Continental was engaged in interstate commerce among said states.

On January 7, 1961, after hearing argument, the Denver district court entered findings of fact, conclusions of law, and judgment (R. 257). The court concluded that the Colorado Anti-Discrimination Act "may not constitutionally be extended to cover the flight crew personnel of an interstate air carrier" (R. 285) because such application of the Act (1) would unconstitutionally burden interstate commerce (R. 260–273), and (2) would be preempted by the Railway Labor Act (R. 274–277), the Civil Aeronautics Act of 1938 (R. 277–283), and federal executive orders dealing with discrimination by employers contracting with the federal government (R. 283–284). With respect to the executive orders, the court stated that "[a]s a certificated commercial carrier by air, [Continental] is obligated to and in fact does transport United States mail under contract with the United States Government" and that "[t]herefore, Continental remains constantly in the status of one contracting with the federal government and subject to the nondiscrimination policy required of such contractors" (R. 284). Accordingly, the court set aside the determination of the Commission and dismissed petitioner Green's complaint.

Upon appeal, the Supreme Court of Colorado, in a 4 to 3 decision, affirmed. It held that "[r]acial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States" (citing *Hall* v. *DeCuir*, 95 U.S. 485, and *Morgan* v. *Virginia*, 328 U.S. 373) (R. 294).[3]

SUMMARY OF ARGUMENT

I

A. The commerce clause does not, of its own force, prohibit state regulation affecting interstate commerce unless the State places a burden on such commerce or the subject requires uniformity. *E.g.*, *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 770. Consequently, this Court has sustained many state laws affecting commerce in the absence of Congressional action. For example, a State may examine and license trainmen engaged in interstate commerce to ensure their fitness and skill (*Nashville, Chattanooga & St. Louis Ry. Co.* v. *Alabama*, 128 U.S. 96; *Smith* v. *Alabama*, 124 U.S. 465), require a minimum crew to move trains (*Chicago, R.I. & Pac. Ry. Co.* v. *Arkansas*, 219 U.S. 453), and prescribe regulations for the payment of their wages (*Erie R. Co.* v. *Williams*, 233 U.S. 685).

[3] The decision of the Supreme Court of Colorado has been the subject of uniformly adverse comment in legal periodicals. See Comment, 76 Harv. L. Rev. 404 (1962); Comment, 62 Col. L. Rev. 1348 (1962); Comment, 110 Pa. L. Rev. 1033 (1962); Comment, 48 Va. L. Rev. 1149 (1962); Note, *Employment Discrimination and Interstate Carriers*, 37 Ind. L.J. 490 (1962).

B. The Colorado Anti-Discrimination Act does not burden interstate commerce through diversity of local regulation. In holding that "[r]acial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States," the Colorado Supreme Court relied upon *Hall* v. *De Cuir,* 95 U.S. 485, and *Morgan* v. *Virginia,* 328 U.S. 373. But in those cases, far from holding the regulation relating to racial discrimination invalid *per se,* the Court determined from the particular circumstances whether unreasonable obstacles to the flow of commerce would result from allowing the state law to stand. The statutes in the *Hall* and *Morgan* cases dealt with segregation of interstate passengers, and were held unconstitutional because, in conjunction with the laws of sister States, they required, or would likely have required, the rearrangement of passengers when state lines were crossed. Where the Court could find no interference with the flow of commerce, a state regulation relating to racial discrimination was sustained. *Bob-Lo Excursion Co.* v. *Michigan,* 333 U.S. 28, 39.

Application of state fair employment practices' acts to hirings by interstate carriers creates no real threat of a burdensome diversity of regulation impeding the flow of interstate commerce. First, hiring is essentially local in nature, completed before interstate movement is begun. Second, the Fourteenth Amendment greatly minimizes, if it does not eliminate, the risk of conflicting state regulation since any

state law requiring discrimination would be plainly unconstitutional. Nor is there the threat of conflict between state and national policies, since the national policy—established by the Constitution and confirmed by Congress and the executive branch in many statutes and regulations—is firmly opposed to racial discrimination.

C. The Colorado Act does not otherwise impede the free flow of commerce. There is no evidence that the Act, either on its face or as applied, discriminates against interstate commerce. Nor does the Act impose substantial economic disabilities on interstate carriers. The statute's sole requirement is that, if the carrier elects to hire in Colorado, all applicants for employment shall be treated alike, regardless of their race or color. In the full train crew cases, this Court held that a State may require an interstate carrier to hire a specified number of employees because of the State's interest in the safety of railroad operations. *E.g., Chicago, R.I. & Pac. Ry. Co.* v. *Arkansas,* 219 U.S. 453. As a result, carriers were forced to hire what they considered to be an excessive number of employees. *A fortiori,* a State does not unduly burden commerce by requiring an air carrier, in the interest of the public welfare of the State, to hire the pilot best qualified for a position which the carrier admittedly wants filled. Such a requirement, far from hindering interstate commerce, facilitates its free flow by requiring airlines to hire pilots on the basis of their qualifications, and not on the basis of irrelevant and invidious considerations.

II

This Court has repeatedly held that the police powers of the State are not superseded by federal statutes unless preemption was "the clear and manifest purpose of Congress." *E.g., Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230. No federal statute or regulation prevents the application of state laws prohibiting discrimination in employment to hiring by interstate carriers.

A. The Civil Aeronautics Act (now the Federal Aviation Act), while conferring broad powers on the Civil Aeronautics Board to regulate the air transportation industry, did not remove all the activities of interstate air carriers from the reach of state law. Since employment relations were not covered by the Act at all, with the possible exception of two provisions, they were susceptible of state regulation in ways not interfering with Board jurisdiction. The two exceptions were provisions prohibiting discrimination generally which may possibly have prohibited racial discrimination in hiring. If they did, this merely means that the state unemployment acts and the Civil Aeronautics Act had the same objective. This Court has frequently sustained parallel state and federal regulation.

The circumstances of this case show no basis for finding preemption:

1. The federal regulation, if any, of discrimination in employment by air carriers was not so comprehensive as to suggest that Congress intended to be definitive. It is scarcely believable that the short and incidental references to discrimination in employment in

the Civil Aeronautics Act could be intended to oust the States of jurisdiction.

2. There is no substantial danger that coincidental state regulation would interfere with the effectuation of the federal policy either by upsetting the balance of federal rights and duties or by hampering the operation of the federal agency. Thus, this case is very unlike the preemption cases which have arisen in the complex field of labor-management relations.

3. The federal interest in preserving equal opportunity in employment is not so preeminent nor the need for uniformity so great as to indicate that Congress must have intended to establish an exclusive rule.

4. The authority of the Board over racial discrimination in hiring, if it exists, has never been exercised. The bare existence of uncertain and unexercised administrative authority does not normally preclude state regulation.

B. While certain provisions of the Railway Labor Act apply to air carriers, these provisions, like the entire Act, deal only with union organization and collective bargaining between the carriers and their employees. The Colorado Anti-Discrimination Act deals with an entirely different segment of employer-employee relations—the promotion of equal opportunity in employment regardless of race, creed, or color.

C. Federal executive orders require that all contracts with the federal government include a clause prohibiting racial discrimination in hiring in connection with the contract. While respondent carries mail, it does so under 49 U.S.C. 1375; it did not enter

into a contract with the government, with or without a non-discrimination clause. Even if there had been such a contract, there is no basis for concluding that the federal government, in promulgating executive orders against discrimination, intended to permit companies to utilize federal contracts as a means of avoiding existing state prohibitions of racial discrimination. Experience has shown that federal-state cooperation in this area has been mutually beneficial.

ARGUMENT

INTRODUCTION

Discrimination in employment on the basis of race is a major national problem. All too often Negroes, even when equally or better qualified than whites, are refused employment. This situation is particularly acute with regard to employment in skilled and professional occupations. The result is that Negroes are denied, in significant measure, the economic opportunities which Americans regard as essential in a free society. The nation as a whole is seriously injured by the practice, economically as well as spiritually, for our increasingly complex economy requires the services of all skilled and professional workers. See 1961 United States Commission on Civil Rights Report, *Employment*, pp. 1–2.

Broad legislation prohibiting racial discrimination in employment practices and providing administrative bodies with enforcement powers has been enacted in eighteen States (including Colorado) since

1945, when New York passed the Ives-Quinn Act.[4] Many of these statutes have been applied by the States to interstate carriers. See Brief of the American Jewish Congress, *et al.*, as *amicus curiae*, pp. 10–12. Seven other States have enacted some legislation relating to employment discrimination.[5] These statutes were designed to promote the public welfare, and respondent does not question that they constitute a valid exercise of the States' police powers. Compare *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88; *District of Columbia* v. *Thompson*, 346 U.S. 100, 110; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28.

Moreover, these statutes are fully consistent with, indeed they implement, the fundamental national policy of equal treatment of all citizens, regardless of

[4] Alaska Comp. Laws Ann. §§ 43–5–1 to 43–5–10 (Supp. 1958); Cal. Labor Code §§ 1410–1432 (Supp. 1962); Colo. Rev. Stat., 1953, §§ 80–24–1 to 80–24–8 (Perm. Supp. 1960); Conn. Gen. Stat. (Rev. 1958) §§ 31–122 to 31–128; Del. Code Ann., Tit. 19, §§ 710–713 (Supp. 1960); Mass. Ann. Laws, ch. 151B, §§ 1–10 (1957); Mich. Stat. Ann. §§ 17.458(1)–17.458(11) (1960); Minn. Stat. Ann. §§ 363.01–363.13 (1957); N.J. Stat. Ann. §§ 18:25–1 to 18:25–28 (Supp. 1962); N.M. Stat. Ann. §§ 59–4–1 to 59–4–14 (1953); N.Y. Executive Laws §§ 290–301 (1951); Ohio Rev. Code Ann. §§ 4112.01–4112.99 (Page Supp. 1962); Ore. Rev. Stat. 659.010–659.990 (1961); Pa. Stat. Ann., Tit. 43, §§ 951–963 (Supp. 1961); R.I. Gen. Laws Ann. §§ 28–5–1 to 28–5–39 (1956); Wash. Rev. Code Ann. §§ 49.60.010–49.60.320 (1962); Wis. Stat. Ann. §§ 111.31–111.38 (Supp. 1962).

[5] Ariz. Rev. Stat. §§ 23–371 to 23–375 (1956); Ill. Ann. Stat. ch. 29, §§ 17–24g, ch. 127, §§ 214.1–214.5 (Smith-Hurd 1953, as amended, Supp. 1962); Ind. Ann. Stat. §§ 40–2307 to 40–2317 (Burns Supp. 1962); Iowa Senate Concurrent Resolution 15, April 25, 1955, CCH Lab. L. Rep., 1 State Laws, § 47,500; Kan. Gen. Stat. §§ 44–1001 to 44–1014 (G.S. Supp. 1961); Neb. Rev. Stat. §§ 48.215–48.216 (1960); Nev. Rev. Stat. § 338.125 (1959).

race, creed, or color. This broad policy reflected in the Fourteenth and Fifteenth Amendments and in numerous federal statutes has been specifically applied by the Chief Executive to employment. Executive Order 10925, issued by President Kennedy on March 6, 1961, states that "discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States * * *," establishes the President's Committee on Equal Employment Opportunity, and charges it with meeting the "urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity." 26 Fed. Reg. 1977.

The sole issue is whether the State is precluded from dealing with racial discrimination in the circumstances of this case, involving an interstate carrier, even though it may prohibit racial discrimination in hiring generally. The Colorado courts held that the Colorado Anti-Discrimination Act could not be applied to hiring by an interstate carrier within Colorado because such application was barred by the commerce clause and by federal legislation and regulations which have occupied the field. Similar state air carriers (*e.g., Jeanpierre* v. *Arbury,* 3 App. Div. 2d 514, 162 N.Y.S. 2d 506; *Banks* v. *Capital Airlines,* 5 Race Rel. L. Rep. 263 (N.Y. State Commission Against Discrimination, February 29, 1960)) and to other employers engaged in interstate and foreign commerce (*American Jewish Congress* v. *Carter,* 23 Misc. 2d 446, 190 N.Y.S. 2d 218, modified *per curiam,* 10 App. Div. 2d 833, 199 N.Y.S. 2d 157,

affirmed, 9 N.Y. 2d 223, 173 N.E. 2d 788, 213 N.Y.S. 2d 60 (state anti-discrimination law applied to firm engaged in foreign commerce)). The effect of the decision below, if it were sustained, would be to prevent the application of state anti-discrimination statutes to the millions of jobs provided by interstate carriers or, at the least, to the many thousands of jobs which require the employee himself to travel in interstate commerce.

In our view, the holdings of the Colorado courts were erroneous. We submit that the States, acting consistently with the national policy, have the power to prohibit all racial discrimination in hiring which is conducted within their territory and, more particularly, that they may prohibit such discrimination by interstate carriers. We see no conflict in the application of state anti-discrimination legislation to interstate carriers, either from the standpoint of the inherent power of Congress under the commerce clause or from the standpoint of any federal statute or regulation.

I

THE COLORADO ANTI-DISCRIMINATION ACT, AS APPLIED TO THE HIRING OF EMPLOYEES BY AN INTERSTATE CARRIER WITHIN COLORADO, IS CONSISTENT WITH THE COMMERCE CLAUSE

A. THE COMMERCE CLAUSE DOES NOT PROHIBIT STATE REGULATION AFFECTING INTERSTATE COMMERCE UNLESS IT BURDENS SUCH COMMERCE OR THE SUBJECT REQUIRES UNIFORMITY

The Constitution grants to Congress the power to "regulate Commerce * * * among the several

States,"[*] but it neither expressly excludes nor reserves a concurrent power in the States. At first it was thought that the power to regulate interstate commerce resided exclusively in the Congress, and that all state regulation was impliedly prohibited whether or not Congress had acted. *Gibbons* v. *Ogden*, 9 Wheat. 1. A few years later, however, in a landmark opinion, the Court laid down the rule which still applies today: "Whatever subjects of [the commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 12 How. 299, 319. On the other hand, the Court held that the States may legislate concerning subjects covered by the commerce clause—such as the use of local harbor pilots—which do not require uniform regulation. It is now well settled that in the latter situation a state statute does not fall merely because it may be regarded as "regulating" interstate commerce; instead,

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[*] U.S. Const., Art. I, § 8, cl. 3. See generally Note, *Discrimination and the Commerce Clause*, 58 Yale L.J. 329 (1949); Ribble, *State and National Power over Commerce* (1937); Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (1937); Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1 (1940); Dowling, *Interstate Commerce and State Power—Revised Version*, 47 Col. L. Rev. 547 (1947); Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 Vand. L. Rev. 446 (1951); Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv. L. Rev. 645, 883 (1946); Dunham, *Congress, The States and Commerce*, 3 J. Pub. L. 47 (1959).

such regulation is upheld so long as it does not constitute a burden on interstate commerce. *E.g., Stone* v. *Farmer's Loan & Trust Co.,* 116 U.S. 307, 334; *Smith* v. *Alabama,* 124 U.S. 465, 473–474; *Illinois Central Railroad Co.* v. *Illinois,* 163 U.S. 142; *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 770; *Morgan* v. *Virginia,* 328 U.S. 373, 380. In short, as the Court stated in *Southern Pacific,* "[t]here has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern." 325 U.S. at 770.

In applying this rule, the Court has made an "accommodation of the competing demands of the state and national interests involved." *Parker* v. *Brown,* 317 U.S. 341, 362. As a result, the States may pass regulatory legislation even though it has an impact on interstate commerce and interstate carriers, when the matter being regulated is of local concern and presents no threat of burdensome diversity of treatment. *Id.* at 359–360; *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 767; *Huron Cement Co.* v. *Detroit,* 362 U.S. 440, 443–444; *Cities Service Co.* v. *Peerless Co.,* 340 U.S. 179, 186; *California* v. *Thompson,* 313 U.S. 109, 113–114; *Milk Control Board* v. *Eisenberg Farm Products,* 306 U.S. 346; *South Carolina Highway Department* v. *Barnwell Bros.,* 303 U.S. 117, 185–191; *The Minnesota Rate Cases,* 230 U.S. 352, 402–

412. Thus, interstate carriers, including air carriers, are subject to state law for torts occurring within the limits of the State. *Minnesota Rate Cases*, 230 U.S. 352, 408; *Prentiss* v. *National Airlines*, 112 F. Supp. 306 (D. N.J.); *Adler's Quality Bakery, Inc.* v. *Gaseteria, Inc.*, 32 N.J. 55, 159 A. 2d 97. The States may promulgate reasonable health and safety laws governing the operation of vessels (*Huron Cement Co.* v. *Detroit*, 362 U.S. 440; *Kelly* v. *Washington*, 302 U.S. 1; *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261), railroads (*Terminal R.R. Ass'n* v. *Trainmen*, 318 U.S. 1; *Missouri Pacific R. Co.* v. *Norwood*, 283 U.S. 249; *Atlantic Coast Line* v. *Georgia*, 234 U.S. 280), and motor vehicles (*Clark* v. *Paul Gray, Inc.*, 306 U.S. 583; *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U.S. 177; *Sproles* v. *Binford*, 286 U.S. 374; *Morris* v. *Duby*, 274 U.S. 135; *Hendrick* v. *Maryland*, 235 U.S. 610). Similarly, reasonable state regulations aimed at protecting public morals and welfare have been held valid as applied to interstate carriers. *E.g.*, *Henningtpn* v. *Georgia*, 163 U.S. 299.

More specifically, this Court has sustained state statutes regulating employment by interstate carriers. In the absence of Congressional action a State, for example, may examine and license trainmen engaged in interstate commerce for the purpose of insuring their fitness and skill (*Nashville, Chattanooga & St. Louis Ry. Co.* v. *Alabama*, 128 U.S. 96; *Smith* v. *Alabama*, 124 U.S. 465); may require a minimum crew for the manning of interstate trains (*Chicago, R. I. & Pac. Ry. Co.* v. *Arkansas*, 219 U.S. 453); and may

prescribe regulations for the payment of their wages (*Erie R. Co.* v. *Williams*, 233 U.S. 685).[7]

Equality of opportunity in employment is plainly a matter of local, as well as national concern. It follows that the Colorado statute is valid unless it places an undue burden upon interstate commerce either by presenting a threat of diversity of regulation in an area where uniformity is important to the free flow of commerce or by imposing some other practical interference with the movement of persons or goods.

B. THE COLORADO ANTI-DISCRIMINATION ACT CARRIES NO THREAT OF BURDENSOME DIVERSITY OF LOCAL REGULATION

The Colorado Supreme Court held that "[r]acial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States" (R. 294). The court did not consider whether application of the par-

[7] These cases all assume that Congress had power to legislate concerning the fields involved, but held that, in the absence of a federal statute, the States have the power to regulate. Thus, the decisions do not depend on a restricted view of the power of Congress over interstate commerce, such as is found in *Adair* v. *United States*, 208 U.S. 161. There the Court held that Congress had no power under the commerce clause to prohibit interstate carriers from discharging an employee because of membership in a labor union. This decision was impliedly overruled in several cases decided by this Court. *E.g.*, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 187.

ticular Colorado statute at issue resulted in substantial impediment to the free flow of commerce. Instead, the court below relied simply upon a number of decisions of this Court invalidating state regulations governing racial discrimination.

That formulation of the issue is much too broad. This Court has never dealt with racial discrimination in general as a fixed category which either is, or is not, subject to state regulation. The true inquiry is whether the character and effect of the particular local statute are such as to create a practical danger of burdensome diversity.

The need for the more particular and practical inquiry is recognized in the precedents upon which the court below mistakenly relied. In *Hall* v. *De Cuir*, 95 U.S. 485, the Court, in holding unconstitutional a Louisiana statute prohibiting segregation in the seating of interstate passengers, stated that commerce could not flourish in the midst of the "embarrassments" which would flow from conflicting state laws requiring rearrangement of passengers at the border of each State through which the carrier passed. *Id.* at 489.[8] In deciding that the statute in question imposed "a direct burden upon inter-state commerce," the Court said that "it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon

[8] See also *South Covington & Cincinnati Street Ry. Co.* v. *Covington*, 235 U.S. 537, 547–548, invalidating a regulation limiting the number of passengers on interstate streetcars.

a view of the particular rights involved." *Id.* at 488. Subsequently, in *Louisville, New Orleans and Texas Ry. Co.* v. *Mississippi,* 133 U.S. 587, 590, the Court characterized the decision in *Hall* as "by its terms carefully limited to those cases in which the law *practically* interfered with interstate commerce" (emphasis added).

In *Morgan* v. *Virginia,* 328 U.S. 373, the Court held that a Virginia statute requiring racially segregated seating of passengers on interstate buses was unconstitutional. The Court stated that the problem before it was to "appraise the weight of the burden of the * * * statute on interstate commerce," and, in so doing, to determine from related statutes of other States "whether there [were] cumulative effects which * * * [made] local regulation impracticable." *Id.* at 381–382. Since it found that eighteen States prohibited racial separation on public carriers and ten States required such separation (*id.* at 382), the Court concluded that "seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel" (*id.* at 386).[9]

[9] It is possible that state-imposed racial discrimination concerning passengers on interstate carriers is always repugnant to the commerce clause, since such a requirement necessarily inhibits the movement of traffic from State to State. In a suit brought by the United States to restrain state-imposed racial segregation in an airport terminal, the district court held that such discrimination violated the commerce clause, without undertaking to analyze the nature and effect of the state action. *United States* v. *City of Montgomery,* 201 F. Supp. 590, 594 (M.D. Ala.); see also *United States* v. *Lassiter,* 203 F. Supp. 20, 25 (W.D. La.), affirmed, 371 U.S. 10. This

Bob-Lo Excursion Co. v. *Michigan,* 333 U.S. 28, demonstrates most convincingly that the practical effects of the particular state regulation on interstate commerce are decisive. There, the Court sustained the State's conviction of a corporation operating an excursion boat between Detroit and a Canadian amusement park for refusing passage to a Negro. In distinguishing the *Hall* and *Morgan* cases, as well as *Pryce* v. *Swedish-American Lines,* 30 F. Supp. 371 (S.D. N.Y.), the Court stated that none of those decisions was "comparable in its facts, whether in the degree of localization of the commerce involved; in the attenuating effects, if any, upon the commerce with foreign nations and among the several states likely to be produced by applying the state regulation; or in any actual probability of conflicting regulations by different sovereignties." 333 U.S. at 39.

The same point is repeatedly made in commerce cases not involving racial issues. For example, in *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520, the Court invalidated, as applied to interstate motor carriers, an Illinois statute requiring trucks and trailers operating on that State's highways to be equipped with a special type of rear fender mudguard which would have been illegal in Arkansas, which was different from those permitted in at least 45 other States, and which would have interfered

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approach, however, though sound in dealing with state action *requiring* discrimination, is inapposite where an anti-discrimination measure in aid of commerce (see *infra*, pp. 31–33) is involved.

seriously with the "interline" operations of motor carriers. The "massive showing of burden on interstate commerce which appellees made at the hearing" (*id.* at 528) was held to outweigh the state interest asserted. On the other hand, in *Huron Cement Co.* v. *Detroit,* 362 U.S. 440, a Detroit smoke pollution ordinance was sustained over commerce clause objections as applied to a water carrier which operated in interstate commerce. To the argument that other local governments might impose differing requirements concerning air pollution, the Court replied that the record contained "nothing to suggest the existence of any such competing or conflicting local regulations." *Id.* at 448.

Application of state fair employment practices acts to hirings by interstate carriers creates no real threat of a burdensome diversity of regulation impeding the flow of interstate commerce. This is apparent from two considerations.

First, the regulation deals with the employment relation not with the interstate movement of persons or goods. The limited incidence of the statute is highly important. Local regulation of the equipment used, of the packing of goods, or of the way in which passengers are seated would, except where prevented by the Fourteenth Amendment, open the door to diversity and conflict requiring new equipment and rearrangement of the passengers and goods at each state line. The *Hall* and *Morgan* cases rest upon this narrow ground. Here the activity regulated does not deal with employees or passengers while in flight.

Colorado was merely regulating hiring which occurred within its borders. The employment relation is formed prior to the employee's participation in the actual movement of interstate commerce.

The relevance of the distinction between state regulation of interstate commerce itself and activity prior to the commencement of interstate commerce has been repeatedly recognized by this Court. In upholding a state licensing requirement for railroad engineers in *Smith* v. *Alabama*, 124 U.S. 465, 482, the Court emphasized that the statute involved was "not, considered in its own nature, a regulation of interstate commerce"; that it was "properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction"; and that "so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely." In *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Alabama*, 128 U.S. 96, the Court upheld a similar state statute. The Court again stated that "[s]uch legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce." *Id.* at 101.

The distinction between a statute which is "in its own nature, a regulation of interstate commerce" and a law which "only affects it incidentally" is irrelevant to the power of Congress to regulate the subject matter; indeed the precedents cited assume that Con-

gress had the constitutional power to act. The distinction is nonetheless material, we submit, although not always decisive standing alone, in determining whether a state law invades a field reserved exclusively to Congress even in the absence of federal legislation.

Second, the Fourteenth Amendment greatly minimizes, if it does not eliminate, the risk of conflicting state regulation of discrimination in employment. Any State law requiring discrimination or segregation because of race, creed, color or national origin would be plainly unconstitutional. See *Brown* v. *Board of Education*, 349 U.S. 294; *Bailey* v. *Patterson*, 369 U.S. 31; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *New Orleans City Park Improvement Ass'n* v. *Detiege*, 358 U.S. 54; *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 420; *Truax* v. *Raich*, 239 U.S. 33. In short, there can be no direct conflict with Colorado's prohibition of racial discrimination in hiring within its own territory since no other State could require a result inconsistent with that guaranteed by the Colorado statute.[10]

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[10] Nor could there be conflicting requirements today in the area of passenger seating. If a sister State were to require carriers to segregate passengers according to race, the requirement would violate the Fourteenth Amendment. *Bailey* v. *Patterson*, *supra*; *Mitchell* v. *United States*, 313 U.S. 80, 94; *Gayle* v. *Browder*, 352 U.S. 903, affirming 142 F. Supp. 707 (M.D. Ala.); *Flemming* v. *South Carolina Electric & Gas Co.*, 224 F. 2d 752 (C.A. 4), appeal dismissed, 351 U.S. 901. Hence, the possibility of conflict, which was the basis of the decision in *Hall* v. *DeCuir*, no longer exists. Thus, contrary to the opinion of the Colorado Supreme Court (R. 295-296), it is not inconsistent for the United States to argue that the commerce clause precludes a state requirement of racial segregation of passengers but does

It may be suggested that other States in which the carrier operates, though they could not adopt policies favoring discrimination, might establish their own anti-discrimination procedures; might make these procedures applicable to employers and employees doing business in the State; and that two commissions might reach differing results in the same factual situation. The possibility of such duplication is more hypothetical than real. State anti-discrimination commissions concern themselves principally with hiring practices within the State—not with hiring that has occurred elsewhere. See note, *The Right to Equal Treatment: Administrative Enforcement of Anti-Discrimination Legislation,* 74 Harv. L. Rev. 526, 566 (1961). There is no occasion to decide whether a State through which a carrier flies may regulate the hiring practices of that carrier, performed in its home State, or whether, if so, such regulation would have to give way in the event of conflict with regulation by the home State. The possibility that such a case will arise is considerably more remote than the possibility of conflicting regulation disregarded in the *Huron Cement* case (see *supra,* p. 25).[11]

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not forbid a state requirement prohibiting such a practice. For the former requirement could readily give rise to a conflict between various States, while the latter could not.

[11] Compare *Bob-lo Excursion Co.* v. *Michigan,* 333 U.S. 28, 37, where the Court upheld a state conviction against attack under the foreign commerce clause because the possibility that Canada might adopt regulations inconsistent with Michigan's was "so remote that it is hardly more than conceivable." Accord, *International Association of Machinists* v. *Gonzales,* 356 U.S. 617, 620.

Nor is there threat of conflict between national and state policies. Federal and state governments alike are required by the Fifth and Fourteenth Amendments to treat all citizens equally regardless of race or color (see *supra*, p. 27). While this does not, of course, mean that the federal and state governments are required to forbid racial discrimination by private employers, it does mean that the Constitution has established a national policy—which has been confirmed by Congress and the executive branch in numerous statutes and regulations—firmly opposed to discrimination. Cf. *Bob-lo Excursion Co.* v. *Michigan*, 333 U.S. 28, 37. Thus, unlike the situation in such cases as *Parker* v. *Brown*, *supra*, and *Southern Pacific Co.* v. *Arizona*, *supra*, there is no need to weigh the state interest against the national. Since both interests are the same, the Colorado Anti-Discrimination Act cannot be inconsistent with the commerce clause without the clearest kind of showing that the method the State has chosen places a heavy burden on interstate commerce. As we have noted, no such proof is even suggested in this case.

C. THE COLORADO ANTI-DISCRIMINATION ACT DOES NOT OTHERWISE BURDEN THE FREE FLOW OF COMMERCE

We have shown that there is no danger of conflicting state regulation requiring invalidation of the Colorado Act on the theory that uniformity is needed to prevent a burden on interstate commerce. Nor does the Act otherwise impede the free flow of commerce from State to State.

First, there is no evidence that, either on its face or as applied, the Act discriminates against interstate commerce. Cf. *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349; *Hood & Sons* v. *DuMond*, 336 U.S. 525. The same rule as to hiring is applied by Colorado whether a carrier moves in intrastate or interstate commerce.

Second, the Colorado Act does not impose substantial economic disabilities on interstate carriers, as this Court found resulted from the challenged state regulations in the cases relied on by the Denver district court (R. 270–272).[12] For example, in *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 781, the Court found that a state statute limiting trains to a certain number of cars was "obstructive to interstate train operations" and had "a seriously adverse effect on transportation efficiency and economy." Since the Court found that, as a safety measure, the statute afforded "at most slight and dubious advantage," it concluded that "examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in adequate, economical and efficient railway transportation service, which must prevail." *Id.* at 779, 783–784.

In contrast, in this case there is no indication in the record that the Colorado statute unduly burdens

[12] *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520; *St. Louis-San Francisco Ry. Co.* v. *Public Service Commission*, 261 U.S. 369; *Missouri, Kansas & Texas Ry. Co.* v. *Texas*, 245 U.S. 484; *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205; *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U.S. 75; *Herndon* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U.S. 135; *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761.

interstate commerce by placing onerous requirements on interstate transportation. The carrier is not told where or how to do its hiring. The Act does not cause delay in the carrier's operations or impose additional costs, apart from the relatively trivial cost of defending against a complaint of discrimination. There is no evidence that respondent has been or will be harassed with frivolous proceedings and no burdensome clerical tasks are demanded. The statute's sole requirement is that, if the carrier chooses to carry out its hiring process in Colorado, all applicants for employment shall be treated alike, regardless of their race or color. We see no basis for suggesting that this is onerous. Indeed, far from "burdening" interstate commerce, the Colorado law facilitates its free flow by ensuring that airlines hire pilots on the basis of their qualifications, and not the basis of irrelevant, as well as invidious, considerations.

Numerous cases decided by this Court strongly support the contention that the Act does not place undue burdens on interstate carriers. In *Missouri Pacific Ry.* v. *Larabee Mills,* 211 U.S. 612, the Court held that the commerce clause does not preclude a state court from issuing mandamus to compel a railroad company to afford equal local switching service to its shippers, even though the cars in regard to which the service is claimed are eventually to be engaged in interstate commerce. In the "full crew law" cases, this Court held that a State could require an interstate carrier to hire a specified, reasonable number of employees when operating its trains with-

in the State because of the State's dominant interest in the safety of railroad operations. *Chicago, R.I. & Pac. Ry. Co.* v. *Arkansas,* 219 U.S. 453; *St. Louis & Iron Mtn. Ry.* v. *Arkansas,* 240 U.S. 518; *Missouri Pacific R. Co.* v. *Norwood,* 283 U.S. 249. The result was that carriers were forced to hire what they considered to be an excessive number of employees.[13] In *Cooley* v. *Board of Wardens of the Port of Philadelphia,* 12 How. 299, the Court rejected the contention that a Pennsylvania law which required vessels in the port of Philadelphia to take a pilot or pay one half the regular amount of pilotage fees was inconsistent with the commerce clause. *A fortiori,* a State does not unduly burden commerce by requiring a carrier, in the interest of the public welfare of the State, to hire the man best qualified for a position that the carrier wants to fill. Such a statute is "in aid, not in obstruction of commerce" (*Chicago, R.I. & Pac. Ry. Co.* v. *Arkansas, supra,* 219 U.S. at 466 (upholding a full crew law)).

[13] In its *Southern Pacific* decision, the Court distinguished the full train crew cases on the ground that in these cases the state regulation "had no effects outside the state beyond those of picking up and setting down the extra employees at the state boundaries; they involved no wasted use of facilities or serious impairment of transportation efficiency, which are among the factors of controlling weight here." 325 U.S. at 782. The same factors make the present case like the full crew law cases and unlike *Southern Pacific.* Indeed, the Colorado statute has less of an effect on the actual interstate operation of the carrier than the full crew laws, because it does not result in adding or dropping employees at state boundaries.

II

NO FEDERAL STATUTE OR REGULATION PREVENTS THE APPLICATION OF STATE LAWS PROHIBITING DISCRIMINATION IN EMPLOYMENT

Under Article VI, clause 2 of the Constitution a federal statute is "the supreme law of the land," and any inconsistent State laws must yield. If Congress, exercising a proper legislative power, explicitly excludes concurrent state regulation, the States lose power to deal with the subject.[14] If Congress expressly consents to supplemental, duplicate, or even inconsistent state regulation, the courts will give effect to the States' exercise of jurisdiction.[15] Most federal statutes include no definitive declaration, leaving it to the judiciary to determine the intendment of the particular statute with respect to the application of concurrent state measures. And although the ultimate question is always one of legislative intent, the Court has developed general guides to the disposition of particular cases.[16]

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[14] *E.g.*, United States Warehouse Act, Section 29, 7 U.S.C. 269; Railway Labor Act, Section 2, 45 U.S.C. 152.

[15] *E.g.*, Fair Labor Standards Act, Section 18, 29 U.S.C. 218; Labor-Management Reporting and Disclosure Act, Sections 603(a), 604, 29 U.S.C. (Supp. II) 523(a), 524; Securities and Trust Indentures Act, Section 8, 15 U.S.C. 77r.

[16] See generally Dunham, *Congress, The States and Commerce*, 8 J. Pub. L. 47, 59–65 (1959); Note, *Preemption as a Preferential Ground; A New Canon of Construction*, 12 Stan. L. Rev. 208 (1959); Note, *"Occupation of the Field" in Commerce Clause Cases, 1936–1946: Ten Years of Federalism*, 60 Harv. L. Rev. 262 (1946).

State regulation must give way if it actually conflicts with federal legislation either because the state and federal duties are inconsistent or because the State would deny a right conferred by the Congress. *E.g., United Mine Workers* v. *Arkansas Flooring Co.*, 351 U.S. 62. The federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148. Or the act of Congress may touch a field in which the federal interest is so dominant that the federal statute will be assumed to preclude enforcement of state laws on the same subject. *Hines* v. *Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern Ry. Co.* v. *Railroad Commission*, 236 U.S. 439; *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co.*, 237 U.S. 597; *New York Central R. Co.* v. *Winfield*, 244 U.S. 147; *Napier* v. *Atlantic Coast Line*, 272 U.S. 605. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill* v. *Florida*, 325 U.S. 538.

Such guides are useful but the ultimate question is always whether the application of state law would be accepted or rejected by one devoted to implementation of the policy legislated by Congress, in both its affirmations and limitations. The best test is whether the intervention of the State threatens to upset the balance of interests that Congress has struck. Thus,

Mr. Justice Black, speaking for the Court in *Hines* v. *Davidowitz,* 312 U.S. 52, 67, said that:

> Our primary function is to determine whether, under the circumstances of the particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Mr. Justice Frankfurter pointed to the same critical question in *De Veau* v. *Braisted* 363 U.S. 144, 153:

> Would Congress, with a lively regard for its own federal * * * policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy?

Federal laws will not lightly be held to preempt an area against state legislation. Throughout its history the Court has presumed the constitutionality of state statutes, and thus has repeatedly held that the police powers of the States are not superseded unless preemption was "the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp., supra,* 331 U.S. at 230–231; *California* v. *Zook,* 336 U.S. 725, 733; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U.S. 740, 749; *Maurer* v. *Hamilton,* 309 U.S. 598, 614; *H. P. Welch Co.* v. *New Hampshire,* 306 U.S. 79, 85; *Kelly* v. *Washington,* 302 U.S. 1, 11. In *Railway Mail Ass'n* v. *Corsi,* 326 U.S. 88, this Court upheld—in a case similar to this one—the application of a New York statute prohibiting labor organizations from denying membership on the basis of race to an organization of federal postal clerks. In determining that various federal statutes regulating the terms and conditions of em-

ployment of such employees did not preempt the field, this Court said (*id.* at 97):

> Congress must clearly manifest an intention to regulate for itself activities of its employees, which are apart from their governmental duties, before the police power of the state is powerless. * * * There is no such clear manifestation of Congressional intent to exclude in this case.

In the Colorado courts respondent urged that the field of ~~civil~~ racial discrimination in hiring by interstate carriers was preempted by: (1) the Civil Aeronautics Act of 1938, now known as the Federal Aviation Act of 1958; (2) the Railway Labor Act; and (3) federal executive orders forbidding discrimination by government contractors. The Denver district court held that the field was preempted by all three (R. 260–283). The Colorado Supreme Court approved the findings, conclusions, and judgment of the trial court but apparently preferred to rest its own decision upon the commerce clause (R. 293–296).

We submit that nothing in these federal laws and regulations precludes application of the Colorado Anti-Discrimination Act.

A. THE CIVIL AERONAUTICS ACT DID NOT PRECLUDE STATE LEGISLATION PROHIBITING DISCRIMINATION IN EMPLOYMENT BY INTERSTATE AIR CARRIERS

The Civil Aeronautics Act of 1938 (now the Federal Aviation Act)[17] conferred upon the Civil Aero-

[17] 52 Stat. 973, as amended, 49 U.S.C. (1952 ed.) 401–722. Subsequent to the discriminatory acts and exercise of jurisdiction by the Colorado Commission in this case, the Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. 1301–1542 took effect, reenacting the 1938 Act without giving the Board any substantial new powers except in the field of air safety. As the

nautics Board wide power to regulate routes and rates, to issue certificates of public convenience and necessity, to deal with unfair methods of competition, to scrutinize mergers, contracts and other inter-carrier transactions, and to regulate related activities. See H. Rep. No. 2254, 75th Cong., 3d Sess. (1938). But broad as this power may have been, the legislation did not totally remove all the activities of interstate air carriers from the reach of state law. They are subject to certain non-discriminatory state taxes. *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292;[18] *Braniff Airways, Inc.* v. *Nebraska Board*, 347 U.S. 590, 597. The States may regulate the intrastate transportation of persons and property other than mail. *People* v. *Western Air Lines*, 42 Cal. 2d 621, 268 P. 2d 723 (Sup. Ct.), appeal dismissed, 348 U.S. 859. And in *Porter* v. *Southwestern Aviation, Inc.*, 191 F. Supp. 42 (M.D. Tenn.), the federal district

Tennessee Supreme Court has stated, the 1958 Act is "merely an administrative measure, limited to the regulation of the operation of aircraft in the interest of public safety." *Southeastern Aviation, Inc.* v. *Hurd*, 209 Tenn. 639, 648, 355 S.W. 2d 436, 440, appeal dismissed, 371 U.S. 21.

[18] While, as the court below noted (R. 279), Mr. Justice Jackson stated in *Northwest Airlines*, 322 U.S. at 303, that "[f]ederal control is intensive and exclusive," he did so in a concurring opinion which was his alone. It is apparent from Justice Jackson's opinion, moreover, that he was not of the view that the States were precluded even from all regulation of air commerce. On the contrary, the opinion concurred in the judgment of the Court upholding a Minnesota personal property tax applied to a fleet of airplanes operated by an interstate carrier with a home port in Minnesota. The gist of the concurring opinion was that the federally protected right of free transit through the navigable airspace overlying the States preempted state taxation or regulation of air transportation solely on the basis of such transit.

court held that a wrongful death action, involving alleged violations of the Federal Aviation Act, was not barred by the Act since "pre-emption was not the Congressional intent." *Id.* at 43.

The Civil Aeronautics Board was given no power by the Civil Aeronautics Act to regulate employment relations upon interstate air carriers, and no provision of the Act, with two possible exceptions, was addressed to any aspect thereof. Plainly, employment practices and terms and conditions of employment are susceptible of regulation in ways that will not interfere with, or duplicate, any segment of C.A.B. jurisdiction.

Two related provisions of the Aeronautics Act were invoked below in an effort to show that the Civil Aeronautics Board has been given jurisdiction over the specific subject of unjust discrimination in employment. Section 404(b) provided (now 49 U.S.C. 1374(b)):

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

And Section 2 (now 49 U.S.C. 1302), which defined the public interest, directed the Board to consider:

> (c) The promotion of adequate, economical, and efficient service by air carriers at reason-

> able charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices * * *.

It has never been held that these provisions were or are applicable to discrimination in employment.[19] The Civil Aeronautics Board has not applied them to employment. If they relate only to discrimination in the service offered—to discrimination among passengers, shippers, localities, etc.—then they have no bearing upon the present case. If they also apply to discrimination in employment, then the Civil Aeronautics Board could obtain an injunction against continued violations (see 49 U.S.C. (1952 ed.) 647; now 49 U.S.C. 1487) and could perhaps take the carrier's hiring practices into account in awarding routes and making other determinations. We made the latter assumption for the purposes of this case because even on this assumption, as we now show, Sections

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[19] The Denver district court relied (R. 279) upon *Fitzgerald* v. *Pan American World Airways*, 229 F. 2d 499, where the Court of Appeals for the Second Circuit held that one denied first-class passage on an air carrier because of his race could bring a civil action for damages in a federal court on the basis of 49 U.S.C. (1952 ed.) 484(b). The district court also noted (R. 281) that this Court had construed a similar provision in the Interstate Commerce Act to prohibit railroads from discriminatin against Negro passengers. *Mitchell* v. *United States*, 313 U.S. 80. See also *Georgia* v. *United States*, 371 U.S. 9; *Boynton* v. *Virginia*, 364 U.S. 454; *Henderson* v. *United States*, 339 U.S. 816; *N.A.A.C.P.* v. *St. Louis-San Francisco Ry. Co.*, 297 I.C.C. 335; *Keys* v. *Carolina Coach Co.*, 64 M.C.C. 769.

2(c) and 404(b) did not preclude concurrent state regulation.

Manifestly there is, even on this assumption, no inconsistency between federal and state law, or federal and state policy. Both are aimed at the same objective. Respondent's argument for preemption is based upon occasional expressions in the opinions of the Court, such as (*Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co.*, 237 U.S. 597, 604):

> When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition.

See also *Missouri Pacific R. Co.* v. *Stroud*, 267 U.S. 404; *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 775; *Garner* v. *Teamsters Union*, 346 U.S. 485, 490–491; *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1. But, as the Court pointed out in *California* v. *Zook*, 336 U.S. 725, 730, "the fact of identity does not mean automatic invalidity of state measures. Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent." The Court has more than once sustained partially parallel state and federal regulation. *E.g., California* v. *Zook, supra; De Veau* v. *Braisted*, 363 U.S. 144; *Parker* v. *Brown*, 317 U.S. 341. A federal statute will not preempt the field unless the danger of interference with a comprehensive federal scheme indicates the need for exclusivity or there is similar evidence that such is the legislative intent.

1. *The Federal Regulation, if any, of Discrimination in Employment by Air Carriers Was Not So Comprehensive and Detailed as To Suggest That Congress Intended It To Be Definitive*

Section 404(b) was primarily concerned with transportation service. The declaration of policy was directed towards the same central objective. If either Section 404(b) or Section 2(c) covered discrimination in employment, its application was a wholly collateral incident, not the main thrust of the legislation. Nor is the regulation detailed. The Civil Aeronautics Act contained none of the substantive safeguards or procedural and remedial provisions normally associated with any comprehensive measure for increasing equality of opportunity in employment.[20] It is scarcely believable that so short and incidental a reference to discrimination in employment could have been intended to oust the States of jurisdiction.

Thus, the present case is readily distinguishable from such precedents as *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, and *Pennsylvania R. Co.* v. *Public Service Comm.*, 250 U.S. 566, where the thoroughgoing federal supervision indicated that state regulation would interfere with a system intended to be complete. *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co., supra*, was also a case of that character. Not only did the Interstate Commerce Act deal exhaustively with the relation between interstate

[20] For studies of attempts to enact a Federal Fair Employment Practice Act, see Ruchames, *Race, Jobs & Politics: The Story of FEPC*, pp. 199-213 (1953); Kovarsky, *Racial Discrimination in Employment and the Federal Law*, 28 Ore. L. Rev. 54, 62-69 (1958).

shippers and carriers by rail but the Carmack Amendment specifically prescribed the extent of liability for lost and damaged goods—the very subject of the divergent state legislation held to be superseded by federal law.

2. *There Is No Substantial Danger That Coincidental State Regulation Would Interfere With the Effectuation of the Federal Policy Either by Upsetting the Balance of Rights and Duties Established Thereunder or by Hampering the Operations of the Federal Agency*

Many subjects of legislation are by their nature unsuited to concurrent regulation and in these areas a federal law will normally be held to preempt the field against superficially parallel state regulation. *Missouri Pacific R. Co.* v. *Stroud*, 267 U.S. 404—upon which the respondent relied—was a case of this character. The Missouri statute and federal Interstate Commerce Act both forbade giving "any undue or unreasonable preference or advantage" to any shipper or locality. But the identity was only superficial. The bite of such general phrases would be in their application. The claim was that the carrier had discriminated in furnishing cars. Especially in times of shortage—the periods in which the statutes would be most important—only one agency could exercise final authority over the furnishing of cars; if there were two, the orders or findings of one might well impose obligations conflicting with those imposed by the other, even though both were applying the same general statutory terms.

The labor relations cases belong in the same category. Even where a state law is written in the same

terms as the federal labor act, there are wide opportunities for divergence, inconsistency, and confusion. Representation cases may be the best illustration. The statutory provisions of state and federal law governing the choice of bargaining representatives were often identical, but the administrative implementation of the same policies—in rules governing the time for elections, the effect of existing contracts, the definition of the bargaining unit, and the choices to appear on the ballot—might be so widely different that the application of state rules would frustrate the effectuation of the federal policies by the National Labor Relations Board. On this ground state agencies are held to have no jurisdiction to conduct representation proceedings involving employers and employees subject to the federal act. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767; *LaCrosse Tel. Corp.* v. *Wisconsin Employment Relations Board,* 336 U.S. 18.

Essentially the same rationale underlies the labor cases precluding state regulation of employer unfair labor practices and employee strikes and picketing, even when the parties are not exercising rights guaranteed by the federal act.[21] The national labor policy is a delicate balance of guaranteed rights, statutory duties, and conduct left free from legal obligations for the interplay of the opposing forces. "The detailed prescription of a procedure for restraint of speci-

[21] A state law forbidding the exercise of a right secured by the federal statute is manifestly invalid. *Hill* v. *Florida,* 325 U.S. 538; *International Union of United Automobile Workers* v. *O'Brien,* 339 U.S. 454; *United Mine Workers* v. *Arkansas Oak Flooring Co.,* 351 U.S. 62.

fied types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. * * * For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner* v. *Teamsters Union,* 346 U.S. 485, 499–500. The principle is equally applicable both to the conduct of employers and to other employee activities. *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board,* 338 U.S. 953.[22] Furthermore, since the federal labor policies are expressed in broad terms and confided to a specialized agency to administer, identity of statutory language is no guarantee of similarity of regulation. Under such circumstances it is indeed true that "multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters Union, supra,* 346 U.S. at 490–491.

In the case at bar there was no similar danger that the application of the Colorado Anti-Discrimination Act to interstate carriers would have interfered with the effectuation of any federal policy under the Aeronautics Act. The duty imposed upon air carriers by Section 404(b), assuming it applies to employment,

[22] In most of the labor relations cases there has been room for the union to argue that state jurisdiction might result not merely in interference with conduct designed to be left untouched by regulation but even in state curtailment of a guaranteed right. *E.g., Weber* v. *Anheuser-Busch, Inc.,* 348 U.S. 468; *San Diego Building Trades Council* v. *Garmon,* 353 U.S. 26.

is the simple, straight-forward obligation to avoid "unjust discrimination" in employment. Any discrimination based upon race, creed, color, or national origin is obviously unjust. Upon this point there is no room for divergencies in state or federal administration. Surely it will not be suggested that the federal law manifests an intention that air carriers be free to engage in such discrimination in employment as the federal authorities do not prevent. Nor can it be supposed that Congress gave the Civil Aeronautics Board power to enforce the assumed prohibition against discrimination in employment because it perceived a need for a single specialized agency with exclusive jurisdiction to work out subordinate substantive policies, the pace and methods of enforcement, and the appropriate remedies for violations. The overwhelming concerns of the Civil Aeronautics Board are routes, rates, service to passengers and shippers, and the financial condition of air carriers. Congress could not have envisaged a Board charged with these duties as so expert in the field of discrimination in employment as to warrant its having exclusive jurisdiction. In the absence of evidence of such an intent it cannot be supposed that Congress was unwilling to have the States move faster, or provide different remedies, in prohibiting discrimination in employment than the Civil Aeronautics Board.

The danger, in any event, is minimal. For a State to impose a restriction in the area of employment practices that Congress did not intend would not interfere with the implementation of other policies committed to the Civil Aeronautics Board. The as-

sumed federal prohibition of discrimination in employment is not part of a nicely balanced, reticulated pattern of rights and duties such as one finds in the field of labor-management relations where the restriction of a form of employee activities or the imposition of a new employer duty in collective bargaining might affect the whole course of relations between company, employees, and union. Prohibition of discrimination in employment based upon race, creed, color, or national origin can hardly have an adverse effect upon air service, financial condition, routes, or rates.

It may be argued that the concurrent existence of federal and state regulations opens the door to the possibility that two forums will make conflicting findings as to the fact of discrimination upon the same set of circumstances. The danger is wholly theoretical. The Civil Aeronautics Board has never taken action against discrimination in employment. And in any event, the law has never treated the mere existence of alternate forums to hear the same dispute as sufficient ground for compelling the States to forgo jurisdiction. *E.g., Smith* v. *Evening News Ass'n*, No. 13, this term, decided December 10, 1962.

3. ***The Federal Interest in Preserving Equal Opportunities in Employment Is Not so Preeminent nor the Demonstrated Need for Uniformity so Great as To Indicate That Congress Must Have Intended To Establish an Exclusive Rule***

The relative importance of the respective interests of the States and Nation in a particular subject of regulation bears upon the likelihood that Congress intended to preempt the field. It is far more probable

that Congress would exclude state regulation in areas affecting international relations or the national defense than that it would exercise the commerce power in such a way as to supersede state laws relating to public health. The Court drew heavily upon this consideration in invalidating Pennsylvania's alien registration law in *Hines* v. *Davidowitz*, 312 U.S. 52. Similar considerations entered into the judgment in *Pennsylvania* v. *Nelson*, 350 U.S. 497.

A State's interest in equality of opportunity in employment is at least as strong as that of the federal government. While interstate competition or the risk of labor disputes affecting interstate commerce might some day lead to the enactment of a uniform national rule, the areas most directly affected are the localities in which discrimination occurs. The State's interest is not materially diminished by the fact that the discrimination may sometimes run against non-residents, or that the employment may sometimes involve interstate journeys.

Nor is this an area in which state regulation is likely to lead to such embarrassing diversity as to make one quick to suppose that Congress was seeking to provide a single national rule (see *supra*, pp. 27–29). The present case contrasts with those involving federal statutes enacted after experience with state regulation had revealed the costs of conflict and confusion under diverse state legislation. See *Campbell* v. *Hussey*, 368 U.S. 297; *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 506–507; *New York Central R. Co.* v. *Winfield*, 244 U.S. 147, 149–150; see also *Napier* v.

Atlantic Coast Line, 272 U.S. 605; *Southern Ry. Co.* v. *Railroad Commission*, 236 U.S. 439.

4. *The Bare Existence of Uncertain and Unexercised Federal Administrative Authority does not Preclude State Regulation of the Discriminatory Employment Practices of Interstate Air Carriers*

Any federal authority over racial or religious discrimination in employment is, at best, both uncertain and discretionary. The Civil Aeronautics Board has never claimed nor exercised the power to intervene. The Court has frequently refused to find supercession where federal agency power, though clear, "lies dormant and unexercised." *Bethlehem Steel Company* v. *New York State Labor Relations Board*, 330 U.S. 767, 775.[a] Accord, *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79; *Northwestern Bell Telephone Co.* v. *Nebraska State Railway Commission*, 297 U.S. 471. In the *Bethlehem Steel* case, the Court declared (330 U.S. at 774):

> [W]hen federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject * * *, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation * * *.

[a] In *Bethlehem Steel*, the Court did find preemption since federal power had been exercised.

> The states are in those cases permitted to use their police power in the interval. [Citations omitted.]

And in *Garner* v. *Teamster Union, supra,* the Court carefully distinguished the situation where "the federal Board would decline to exercise its powers once its jurisdiction was invoked." 346 U.S. at 488.

The force of these decisions is not impaired by *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1, where the Court held that the National Labor Relations Act displaced state power to deal with labor relations affecting interstate commerce, even where the Labor Board had declined to exercise its jurisdiction. The Court declared that "in each case the question is one of congressional intent," and found a "general intent to preempt the field" of labor-management relations in businesses affecting commerce. The Court, emphasizing that the Board had not ceded jurisdiction to a state agency, as Section 10(a) of the Act authorized, held that Section 10(a) carried with it an "inescapable implication" that a cession agreement was to be the only method of authorizing intervention by a State. 353 U.S. at 10. It is also significant that the boundaries of the discretionary jurisdiction of the National Labor Relations Board not only shifted from time to time in the exercise of the Board's discretion but each set of current standards was imprecise and subject to exceptions, so that the recognition of any state authority created danger of subjecting to inconsistent state laws employees and employers subject to actual federal regulation.

In summary, any federal regulation of discrimination in employment was incidental to the main purposes of the Aeronautics Act; concurrent state authority carries no significant threat of interference with the effectuation of the federal policy, either substantively or procedurally even if the Civil Aeronautics Board were to exercise any power which has until today lain uncertain and unused. Under these conditions the existence of a short federal expression of policy paralleling the more comprehensive state legislation, far from indicating an intent to oust the States of jurisdiction, was the plainest indication that there was no federal objection to the enforcement of state law. In a similar situation in *De Veau* v. *Braisted*, 363 U.S. 144, the Court upheld a New York statute disqualifying felons from holding office in any waterfront labor organization even though a federal statute imposed a similar restriction. In his opinion for four Justices, Mr. Justice Frankfurter said (*id.* at 156):

> The fact that Congress itself has thus imposed the same type of restriction upon employees' freedom to choose bargaining representatives as New York seeks to impose through § 8 * * * is surely evidence that Congress does not view such a restriction as incompatible with its labor policies.

B. THE RAILWAY LABOR ACT DOES NOT PRECLUDE COLORADO FROM PROHIBITING DISCRIMINATORY HIRING BY INTERSTATE AIR CARRIERS

While certain provisions of the Railway Labor Act, 45 U.S.C. 151, 152, 154–163, 181–188, apply to air carriers, these provisions, like the entire Act, deal only with union organization and collective bargaining be-

tween the carriers and their employees. Thus, 45 U.S.C. 151a states that the general purposes of the Act are to guarantee the right of employees to organize and bargain collectively and to facilitate the settlement of disputes over matters such as working conditions and rates of pay. The National Mediation Board, which is established by the Act, may be utilized only in a dispute "between an employee or group of employees and a carrier * * * ." 45 U.S.C. 155. Under the Act it is the "duty of every carrier and of its employees * * * to establish" boards of adjustment, which are used only in connection with "disputes between an employee or group of employees and a carrier or carriers." 45 U.S.C. 184. The National Air Transport Adjustment Board, which is authorized to be established by 45 U.S.C. 185, but has not yet been established, is limited by that Section to settling disputes between air carriers and their "employees." The Act defines "employee" as "every person in the service of a carrier * * * who performs any work" (45 U.S.C. 151), thereby excluding persons who have not yet been hired. In short, no provision of the Act, whether applying to air carriers or not, governs racial discrimination by an employer in hire, tenure, or terms of employment.

The Denver district court recognized that there is no provision in the Railway Labor Act dealing with racial discrimination in hiring (R. 274). The court, however, relied upon decisions of this Court (*Conley* v. *Gibson*, 355 U.S. 41; *Brotherhood of R.R. Trainmen* v. *Howard*, 343 U.S. 768; *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232; *Tunstall* v. *Brotherhood of*

Locomotive Firemen, 323 U.S. 210; *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192), which, it said, established that "racial discrimination by employers subject [to the Railway Labor Act] is forbidden" (R. 274). None of the decisions so holds. Rather, they determine that an exclusive bargaining agent, which has been chosen by employees pursuant to the Railway Labor Act, may not use the powers granted by the Act to discriminate against minorities or to achieve any other objective not relevant to the purpose of the statute. To be sure, the Court said that an abuse of the power of a union may not be accomplished by contracts with a carrier, and it held that employers, as well as unions, might be restrained from acting under bargaining agreements that discriminate against Negro employees. But, as the Court explicitly stated, the contracts were unenforceable not because of any obligation on the employer, but because of bargaining agent was not authorized by the Act to enter into discriminatory agreements. *Brotherhood of R.R. Trainmen* v. *Howard, supra*, 343 U.S. at 772–775; *Steele* v. *Louisville & Nashville R.R., supra*, 323 U.S. at 203–204. See also *Conley* v. *Gibson*, 355 U.S. 41, 45, which emphasized that, although the railroad was engaging in the underlying discriminatory acts, the breach of duty was by the union.

The complete compatibility of the Colorado Anti-Discrimination Act with the Railway Labor Act has been demonstrated by practical experience. The National Labor Relations Act imposes upon collective bargaining representatives the same duty of fair representation as the Railway Labor Act, either as an

obligation enforceable by individual suits or as an aspect of the union's duty to bargain collectively. *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248; Cox, *The Duty of Fair Representation*, 2 Villanova L. Rev. 151. At least twenty States have fair employment practices acts. The statutes have been administered by state agencies altogether distinct from the agencies enforcing state labor relations acts; and they have been extensively applied to employers subject to the National Labor Relations Act. In practice there has been no conflict, inconsistency, or confusion. The explanation is that the labor relations acts deal with one segment of employer-employee relations—union organization and collective bargaining as a method of fixing terms and conditions of employment—whereas the anti-discrimination laws deal with another—the promotion of equal opportunity in employment regardless of race, creed, color, or national origin. The duty of fair representation imposed upon collective bargaining representatives by the labor relation acts—far from raising dangers of collision—eliminates any risk that employers and employees may negotiate *valid* collective bargaining agreements inconsistent with the requirements of state anti-discrimination laws.[23a]

[23a] See *Atchison, Topeka and Santa Fe Ry. Co.* v. *Fair Employment Practice Commission of California*, 7 Race Rel. L. Rep. 164 (Los Angeles Superior Court, January 30, 1962), rejecting the contention that application of a state fair employment practice act to a railroad was preempted by the Railway Labor Act.

C. FEDERAL EXECUTIVE ORDERS RELATING TO GOVERNMENT CONTRACTORS DO NOT PRECLUDE COLORADO FROM PROHIBITING DISCRIMINATORY HIRING BY SUCH A CONTRACTOR

In holding that federal law precludes the application of the Colorado Anti-Discrimination Act to interstate air carriers, the Denver district court also relied in part upon federal executive orders requiring contracting agencies of the federal government to include in their contracts a clause forbidding employment discrimination in connection with work under the contracts. Executive Order 10479, 18 Fed. Reg. 4899 (August 13, 1953); Executive Order 10557, 19 Fed. Reg. 5655 (September 3, 1954).[24] The court purported to take judicial notice that "[a]s a certified commercial carrier by air, [respondent] is obligated to and in fact does transport United States mail under contract with the United States Government" (R. 284).

The state district court erred in two respects. First, respondent in fact had no contract whatever with the

[24] In Executive Order 10557, President Eisenhower ordered that the following clause be included in all contracts executed by contracting agencies of the federal government: "In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin." Executive Orders 10479 and 10557 were revoked and superseded by Executive Order 10925 issued by President Kennedy on March 6, 1961. 26 Fed. Reg. 1977. It requires all contracting agencies of the federal government to include a clause similar to that prescribed by the earlier executive orders in each government contract. In addition, the new executive order requires inclusion in the contract of a clause stating that "the contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."

federal government.[25] In its determination to the contrary, the court relied on 49 U.S.C. 1375, which requires any airline to carry mail. But, while this provision bound respondent to carry mail (which it did), it does not forbid discrimination or compel the execution of a contract subject to the executive orders.

Second, even if a federal regulation concerning contract provisions could preempt state legislation, in the absence of strong evidence to the contrary it could hardly be assumed that the federal government, in promulgating the executive orders in order to lessen racial discrimination, intended to permit companies to utilize federal contracts as a means to avoid existing state fair employment practice acts. The evidence is all the other way. Before the issuance of the executive order, the President's Committee on Civil Rights recommended in 1947 both state and federal action to meet the problems of civil rights: "Parallel state and local action supporting the national program is highly desirable. * * * [T]he enactment of a federal fair employment practice act will not render similar state legislation unnecessary." *To Secure These Rights,* p. 102 (1947). Executive Order 10479 expressly directed the President's Government Contract Committee "to establish and maintain cooperative relationships with agencies of state and local governments * * * to assist in achieving the purposes of this order." See also Executive Orders 10557 and 10925.

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[25] The government filed an affidavit stating this fact in the Colorado Supreme Court.

Finally, experience has shown that federal-state cooperation with respect to complaints against employees who are under a contractual non-discrimination obligation to the federal government is mutually beneficial.[26] No conflict, therefore, is to be anticipated between federal and state action. And no national interest is jeopardized by the coordinate enforcement by the federal and state governments of harmonious anti-discrimination policies.[27]

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[26] Thus, federal investigators have usually accepted a State's finding of no discrimination. On the other hand, a state commission dealing with a government contractor may use the threat that his activities will be reported to the federal government with the possible result that his contract will be cancelled. Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 Harv. L. Rev. 526, 575–576 (1961).

[27] If the state court's view were adopted, an employer could often render a pending proceeding before a state commission a nullity by simply negotiating a contract with the federal government. We do not believe that the constitutional power of the States to prohibit racial discrimination should be permitted to turn upon the individual decisions of potential contractors, constantly shifting with the negotiation and termination of thousands of individual contracts.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be reversed.

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APPENDIX

The Colorado Anti-Discrimination Act of 1957 (1953 Colo. Rev. Stat. § 80–24–1, *et seq.* (Perm. Supp. 1960)) reads in pertinent part as follows:

> 80–24–2. *Definitions.*—* * *
>
> (5) "Employer" shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing six or more employees within the state; * * *.
>
> 80–24–6. Discriminatory and unfair employment practices.—
>
> (1) It shall be a discriminatory or unfair employment practice * * *
>
> (2) For an employer to refuse to hire * * * any person otherwise qualified, because of race, creed, color, national origin or ancestry.

Article I, Section 8, Clause 3 of the Constitution of the United States reads as follows:

> The Congress shall have power * * *
>
> * * * * *
>
> (3) To regulate commerce with foreign Nations, and among the Several States, and with the Indian Tribes; * * *

49 U.S.C. (1952 ed.) 484(b) provided (and 49 U.S.C. 1374(b) now provides) that:

> (b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person,

> port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

49 U.S.C. 402 (1952 ed.) provided (and 49 U.S.C. 1302 now provides) in pertinent part that:

> In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—
>
> * * * * *
>
> (c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; * * *.

Executive Order 10557, 19 Fed. Reg. 5655 (September 8, 1954), revoked by Executive Order 10925 26 Fed. Reg. 1977 (March 6, 1961), provided in pertinent part that:

> WHEREAS the contracting agencies of the United States Government are required by existing Executive orders to include in all contracts executed by them a provision obligating the contractor not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and obligating the contractor to include a similar clause in all subcontracts, and
>
> * * * * *
>
> WHEREAS the Committee on Government Contracts, in consultation with the principal contracting agencies of the Government, has recommended that in the future the contracting agencies of the Government include in place of, and as a means of better explaining, the pres-

ent nondiscrimination provision of Government contracts, the following provision:

In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. * * *

The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and in order to clarify the provisions of the existing orders, it is ordered as follows:

SECTION 1. The contract provision relating to nondiscrimination in employment, recommended by the Committee on Government Contracts, is hereby approved.

SEC. 2. The contracting agencies of the Government shall hereafter include the approved nondiscrimination provision in all contracts executed by them on and after a date 90 days subsequent to the date of this order, except:

a. Contracts and subcontracts to be performed outside the United States where no recruitment of workers within the limits of the United States is involved; and

b. Contracts and subcontracts to meet other special requirements or emergencies, if recommended by the Committee on Government Contracts.

* * * * *

Executive Order 10925, 26 Fed. Reg. 1977 (March 6, 1961), provides in pertinent part that:

WHEREAS discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; and

WHEREAS it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts; and

WHEREAS it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government; and

WHEREAS it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower; and

WHEREAS a review and analysis of existing Executive orders, practices, and government agency procedures relating to government employment and compliance with existing nondiscrimination contract provisions reveal an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity; and

WHEREAS a single governmental committee should be charged with responsibility for accomplishing these objectives:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

* * * * *

SECTION 301. Except in contracts exempted in accordance with section 303 of this order, all government contracting agencies shall include in every government contract hereafter entered into the following provisions:

"In connection with the performance of work under this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.

* * * * *